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BUSINESS LAW SECTION

Judiciary Committee Testimony

H-1 Substitute for HB 5128, Support

Diane L. Akers

I am Diane L. Akers and I have been a commercial litigator with Bodman PLC for over 25 years. I am here representing the Business Law Section of the State Bar of Michigan. The Section consists of approximately 3,400 business lawyers and, by unanimous vote of the Section Council, we support the H-1 Substitute for HB 5128, which would establish a business court in Michigan.

The Section has been actively working to bring a business court to Michigan for over 10 years. Since 2001, I have chaired the Section's Business Court Ad Hoc Committee and, in 2009, also served as Chair of the Section. I also served as Co-Chair of the Business Impact Committee of the State Bar's Judicial Crossroads Task Force, which wrote the report that served as the basis for the business dockets currently operating in the Kent and Macomb County Circuit Courts.

Business lawyers are very interested in this issue. The Business Law Section has held many programs and seminars on business courts, published articles and resource materials, brought in experts and worked with practitioners, court administrators, judges, businesses and others to understand the issues from a variety of perspectives. We worked with some of your predecessors in the House on earlier efforts to enact legislation establishing a business court.

We have analyzed this bill carefully and ours is not just a "rubber stamp" endorsement. We believe that Rep. Walsh, Gov. Snyder and the team that developed this bill have come up with a unique plan that other states will want to emulate because it combines uniform, state-wide jurisdiction with flexibility in local program design. We congratulate them on their inventiveness and initiative.

Why Have A Business Court At All?

In general, business cases have certain things in common. For example, business disputes very often occur between two entities who know each other, may have been doing business with each other for some time, may want to continue to do business with each other (unless the litigation ruins their relationship), and have probably already spent time trying to work out a business solution to their dispute. They may already have exchanged information about their dispute in their effort to work it out. They may already have been through some kind of alternative dispute process because their contract called for it. So, unlike some other kinds of cases, business cases often come to court much farther along in the process simply because of the nature of the relationship of the parties.

PAST COUNCIL CHAIRS

Litigation is very expensive, and the economics of litigation determines a lot about the course of a case. For example, damages are different in business cases because, generally, they are economic only and can be measured more precisely than, for example, in personal injury cases. Unlike cases involving physical injury or mental distress, you can count the widgets and know, more or less, what they cost, and so can assess the potential range of recovery/loss more accurately. There is no potential for a huge, unpredictable jury award. Both sides are generally paying their lawyers by the hour, so trial is going to be costly, even for the winner. No one is on a contingency so no party is getting free representation. Businesses are motivated by business considerations and have no interest in litigating a dispute when the economics of the litigation do not make sense. When all parties must anticipate significant legal costs, and when the litigation does not hold the prospect of a lottery-like payday for any of the litigants, a focus on narrowing the economic issues can often move these cases toward a very prompt resolution.

Business cases can present unique challenges for courts. As a practical matter, even a single large commercial dispute with multiple corporate litigants and their battalions of lawyers can clog a circuit court judge's docket. When a lot is at stake, the parties are going to litigate every issue and the busy circuit judge will be presented with extensive motion practice, briefing and technical material. To make matters more complicated, in Michigan, there is a dearth of case law on business issues. Pull a volume of Michigan Compiled Laws Annotated containing the Uniform Commercial Code from the shelf and check any of the provisions for case law annotations. If you're lucky, you may find a few pages. Therefore, the trial judge presented with complex issues of business law will find little guidance in the reported opinions.

For a variety of reasons, businesses have come to view courts, and state courts in particular, as unsympathetic or even hostile to business. Whenever possible, businesses look for ways to avoid state courts, either by figuring out a way to get into federal court or by putting some type of alternative dispute resolution clauses into their contracts. Rightly or wrongly, businesses view state courts as being slow, expensive and unsophisticated in business issues.

Approximately 26 other states have created various kinds of business courts to address these issues. The most common is the business docket, where business cases are assigned to judges who have or, through their experience as business court judges, develop expertise in management of business cases, business law, and business issues.

Why the H-1 Substitute Is Right For Michigan

The Business Law Section has worked with Rep. Walsh and with Gov. Snyder's staff as this bill has been developed and believes the H-1 Substitute has been well conceived and should be adopted as proposed. There is no cost to this type of business court. The same cases that are filed in the circuit are merely reallocated among the same judges in the circuit. The only difference is that cases meeting the statutory criteria now will be assigned to the business docket judge(s).

Under the H-1 Substitute, for each circuit with 3 or more judges, the Michigan Supreme Court will appoint 1 or more judges, depending on case load requirements, to be

the business court judge. Within the statutory framework, each circuit has the flexibility to design its own business court as part of its concurrent jurisdiction plan. Although circuits with fewer than 3 judges will not be required to have a business court, this bill reaches the courts where the vast majority of commercial litigation filed in Michigan is heard.

The bill also defines which business cases will go into the business court and preserves the \$25,000 jurisdictional requirement, as it now exists. Although business courts arose from concerns about larger commercial disputes, the expertise of the business court judge is very valuable in smaller business disputes as well. Especially in this economy, small businesses can find themselves between the proverbial rock and a hard place. They cannot afford to allow outstanding accounts to lag on without taking action, but they cannot afford to pay lawyers for extended litigation. A business court judge may be able to look at a dispute between 2 small businesses and get to the heart of the issues immediately, getting them out of court and back to tending to their businesses.

This bill brings consistency to the jurisdiction of Michigan's business court and to the selection of Michigan's business court judges, while preserving each circuit's ability to design its business court to suit its circumstances.

Questions About Business Courts

1. Do they take resources from other areas? Nothing in the H-1 Substitute requires the expenditure of any resources and business dockets generally require no additional resources. They simply reallocate the existing cases among the same judges. Circuit courts are locally funded so business docket expenditures, if any, would be determined by the circuit.

In other states, similar questions were raised before business courts were initiated. However, experience turned business court doubters into business court supporters. What they saw is that removing large, cumbersome cases from the general civil docket frees other judges from the undue burden those cases can sometimes impose. The result was that the entire court functioned more smoothly and satisfaction levels rose across the board.

2. Do they encourage "judge shopping" or "forum shopping"? A lawyer always analyzes the options available to the client in any particular circumstance, including the court(s) where the action could be filed or transferred, along with recommendations for what seems best for the client. That's the lawyer's job. There are rules of venue and jurisdiction and pleading to make sure a case gets only into a court where it belongs. Sometimes a party has a choice, for example, when there is both state and federal jurisdiction and both courts are available. There is nothing wrong with that.

It is only a problem when lawyers skirt or even break the rules trying to get into or out of a particular court, depending on whether the lawyer thinks it helps the client, through artful or even fraudulent pleading. But, through federal court removal and remand, for example, we have decades of case law on how to handle such legal maneuvering, and state courts are familiar with other ways that lawyers may try to

mischaracterize their claims, for example, to avoid a statute of limitations that expired before suit was filed.

So, the real issue is not that lawyers will “shop” for alternatives for their clients and a circuit court with a business docket might be one alternative. The real issue is that a few lawyers sometimes use improper means to achieve their ends.

If the H-1 Substitute becomes law, a business court will be available in the circuits that hear most of the state’s commercial litigation, reducing the incentive for lawyers to engage in fraudulent pleading to get into or out of a court with a business docket. The uniformity of jurisdiction throughout the state under the H-1 Substitute will also reduce the opportunity for pleading to come within definitions that apply in one circuit but not in another.

3. Do they subject litigants to the “biases” or idiosyncrasies of the business court judges?

Ours is certainly a human system and few would deny that judicial temperament and personality can sometimes affect the course of a case. But this is no truer with business court judges than any other judges.

Specialization, by its nature, does include some trade-offs. By assigning business cases to a smaller number of judges, those judges develop expertise in management of business cases, business law and business issues. At the same time, business cases go to a smaller number of judges so that an individual judge’s personal preferences can take on greater relative significance, if the judge does not maintain impartiality.

By calling for Supreme Court appointment of business docket judges, the H-1 Substitute at least implies that there will be some uniformity in the approach to appointing business court judges and some control over their continuance in that position. We believe that the benefits of the business docket far outweigh the risk of what comes down to ineffective choices by the Supreme Court or, more fundamentally, the electorate.

The H-1 Substitute is Good for Business

The 3,400 lawyers in the Business Law Section are overwhelmingly corporate and transactional attorneys, not litigators. Our clients range from the largest multinational corporations in the world to mom-and-pop businesses. Whether it is a Harvard-educated general counsel or a self-educated shop owner, they want to know the same thing from their lawyers and they want it in plain language -- “Will this bill be good or bad for my business?”

Business lawyers can give their business clients, large and small, the same answer. This bill is good for business. When a business is involved in a court dispute, the business court will save time and money and will focus on getting the parties back to doing what they want to be doing, *i.e.*, running their businesses.